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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

HYPERMEDIA NAVIGATION LLC,  
  
Plaintiff,  
  
v.  
  
MICROSOFT CORPORATION,  
  
Defendant.

Case No. 4:18-cv-00670-HSG

**STIPULATED ~~PROPOSED~~  
PROTECTIVE ORDER**

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted.

STIPULATED ~~PROPOSED~~ PROTECTIVE ORDER  
Case No. 4:18-cv-00670-HSG

1 This Order does not confer blanket protections on all disclosures or responses to discovery and the  
2 protection it affords from public disclosure and use extends only to the limited information or  
3 items that are entitled to confidential treatment under the applicable legal principles. As set forth  
4 in Section 14.4 below, this Protective Order does not entitle the Parties to file confidential  
5 information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and  
6 the standards that will be applied when a party seeks permission from the court to file material  
7 under seal.

8 2. DEFINITIONS

9 2.1 Challenging Party: a Party or Non-Party that challenges the designation of  
10 information or items under this Order.

11 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is  
12 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule  
13 of Civil Procedure 26(c).

14 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as  
15 well as their support staff).

16 2.4 Designated House Counsel: House Counsel who seek access to “HIGHLY  
17 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

18 2.5 Designating Party: a Party or Non-Party that designates information or items that it  
19 produces in disclosures or in responses to discovery as “CONFIDENTIAL,” “HIGHLY  
20 CONFIDENTIAL – ATTORNEYS' EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE  
21 CODE.”

22 2.6 Disclosure or Discovery Material: all items or information, regardless of the  
23 medium or manner in which it is generated, stored, or maintained (including, among other things,  
24 testimony, transcripts, and tangible things), that are produced or generated in disclosures or  
25 responses to discovery in this matter.

26 2.7 Expert: a person with specialized knowledge or experience in a matter pertinent to  
27 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or as  
28 a consultant in this action, (2) is not a past or current employee of a Party or of a Party's

competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party or of a Party's competitor.

2.8 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or Items: extremely sensitive “Confidential Information or Items,” disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means, as well as information that a Party or Non-Party reasonably believes to be subject to federal, state or foreign Data Protection Laws or other privacy obligations. Examples of such Data Protection Laws include, without limitation, The Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq. (financial information); The Health Insurance Portability and Accountability Act (“HIPAA”) and the regulations thereunder, 45 CFR Part 160 and Subparts A and E of Part 164 (medical information); Regulation (EU) 2016/679 Of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, also known as the General Data Protection Regulation (“GDPR”). To the extent productions of these types of data may require additional safeguards pursuant to Federal, State or foreign statutes, regulations or privacy obligations, the parties will meet and confer to implement these safeguards if and when needed.

2.9 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or Items: extremely sensitive “Confidential Information or Items” representing computer code and associated comments and revision histories, formulas, engineering specifications, or schematics that define or otherwise describe in detail the algorithms or structure of software or hardware designs, disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means.

2.10 House Counsel: attorneys who are employees of a party to this action, as well as their secretaries and paralegal assistants. House Counsel does not include Outside Counsel of Record or any other outside counsel.

2.11 Non-Party: any natural person, partnership, corporation, association, or other legal entity not named as a Party to this action.

1           2.12   Outside Counsel of Record: attorneys who are not employees of a party to this  
2 action but are retained to represent or advise a party to this action and have appeared in this action  
3 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

4           2.13   Party: any party to this action, including all of its officers, directors, employees,  
5 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

6           2.14   Producing Party: a Party or Non-Party that produces Disclosure or Discovery  
7 Material in this action.

8           2.15   Professional Vendors: persons or entities that provide litigation support services  
9 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and  
10 organizing, storing, or retrieving data in any form or medium) and their employees and  
11 subcontractors.

12           2.16   Protected Material: any Disclosure or Discovery Material that is designated as  
13 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or  
14 “HIGHLY CONFIDENTIAL – SOURCE CODE.”

15           2.17   Receiving Party: a Party that receives Disclosure or Discovery Material from a  
16 Producing Party.

17   3.    SCOPE

18           The protections conferred by this Order cover not only Protected Material (as defined  
19 above), but also (1) any information copied or extracted from Protected Material; (2) all copies,  
20 excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations,  
21 or presentations by Parties or their Counsel that might reveal Protected Material. However, the  
22 protections conferred by this Order do not cover the following information: (a) any information  
23 that is in the public domain at the time of disclosure to a Receiving Party or becomes part of the  
24 public domain after its disclosure to a Receiving Party as a result of publication not involving a  
25 violation of this Order, including becoming part of the public record through trial or otherwise;  
26 and (b) any information known to the Receiving Party prior to the disclosure or obtained by the  
27 Receiving Party after the disclosure from a source who obtained the information lawfully and  
28

1 under no obligation of confidentiality to the Designating Party. Any use of Protected Material at  
2 trial shall be governed by a separate agreement or order.

3 4. DURATION

4 Even after final disposition of this litigation, the confidentiality obligations imposed by this  
5 Order shall remain in effect until a Designating Party agrees otherwise in writing or a court order  
6 otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all claims  
7 and defenses in this action, with or without prejudice; and (2) final judgment herein after the  
8 completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,  
9 including the time limits for filing any motions or applications for extension of time pursuant to  
10 applicable law.

11 5. DESIGNATING PROTECTED MATERIAL

12 5.1 Exercise of Restraint and Care in Designating Material for Protection. Each Party  
13 or Non-Party that designates information or items for protection under this Order must take care to  
14 limit any such designation to specific material that qualifies under the appropriate standards. To  
15 the extent it is practical to do so, the Designating Party must designate for protection only those  
16 parts of material, documents, items, or oral or written communications that qualify – so that other  
17 portions of the material, documents, items, or communications for which protection is not  
18 warranted are not swept unjustifiably within the ambit of this Order.

19 Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
20 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to  
21 unnecessarily encumber or retard the case development process or to impose unnecessary  
22 expenses and burdens on other parties) expose the Designating Party to sanctions.

23 If it comes to a Designating Party's attention that information or items that it designated  
24 for protection do not qualify for protection at all or do not qualify for the level of protection  
25 initially asserted, that Designating Party must promptly notify all other Parties that it is  
26 withdrawing the mistaken designation.

27 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order  
28 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,

1 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
2 designated before the material is disclosed or produced.

3 Designation in conformity with this Order requires:

4 (a) for information in documentary form (e.g., paper or electronic documents, but  
5 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing Party  
6 affix the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES  
7 ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE” to each page that contains protected  
8 material. If only a portion or portions of the material on a page qualifies for protection, the  
9 Producing Party also must clearly identify the protected portion(s) (e.g., by making appropriate  
10 markings in the margins) and must specify, for each portion, the level of protection being asserted.

11 A Party or Non-Party that makes original documents or materials available for inspection  
12 need not designate them for protection until after the inspecting Party has indicated which material  
13 it would like copied and produced. During the inspection and before the designation, all of the  
14 material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –  
15 ATTORNEYS’ EYES ONLY.” After the inspecting Party has identified the documents it wants  
16 copied and produced, the Producing Party must determine which documents, or portions thereof,  
17 qualify for protection under this Order. Then, before producing the specified documents, the  
18 Producing Party must affix the appropriate legend (“CONFIDENTIAL,” “HIGHLY  
19 CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE  
20 CODE”) to each page that contains Protected Material. If only a portion or portions of the material  
21 on a page qualifies for protection, the Producing Party also must clearly identify the protected  
22 portion(s) (e.g., by making appropriate markings in the margins) and must specify, for each  
23 portion, the level of protection being asserted.

24 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
25 Designating Party identify on the record, before the close of the deposition, hearing, or other  
26 proceeding, all protected testimony and specify the level of protection being asserted. When it is  
27 impractical to identify separately each portion of testimony that is entitled to protection and it  
28 appears that substantial portions of the testimony may qualify for protection, the Designating Party

1 may invoke a right to have up to 21 days to identify the specific portions of the testimony as to  
2 which protection is sought and to specify the level of protection being asserted. Only those  
3 portions of the testimony that are appropriately designated for protection within the 21 days shall  
4 be covered by the provisions of this Protective Order. Alternatively, a Designating Party may  
5 specify, at the deposition or up to 21 days afterwards if that period is properly invoked, that the  
6 entire transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
7 ATTORNEYS’ EYES ONLY.”

8 Parties shall give the other parties notice if they reasonably expect a deposition, hearing, or  
9 other proceeding to include Protected Material so that the other parties can ensure that only  
10 authorized individuals who have signed the “Acknowledgment and Agreement to Be Bound”  
11 (Exhibit A) are present at those proceedings. The use of a document as an exhibit at a deposition  
12 shall not in any way affect its designation as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –  
13 SOURCE CODE” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

14 Transcripts containing Protected Material shall have an obvious legend on the title page  
15 that the transcript contains Protected Material, and the title page shall be followed by a list of all  
16 pages (including line numbers as appropriate) that have been designated as Protected Material and  
17 the level of protection being asserted by the Designating Party. The Designating Party shall inform  
18 the court reporter of these requirements. Any transcript that is prepared before the expiration of a  
19 21-day period for designation shall be treated during that period as if it had been designated  
20 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” in its entirety unless otherwise  
21 agreed. After the expiration of that period, the transcript shall be treated only as actually  
22 designated.

23 (c) for information produced in some form other than documentary and for any other  
24 tangible items, that the Producing Party affix in a prominent place on the exterior of the container  
25 or containers in which the information or item is stored the legend “CONFIDENTIAL,”  
26 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL –  
27 SOURCE CODE.” If only a portion or portions of the information or item warrant protection, the  
28

Producing Party, to the extent practicable, shall identify the protected portion(s) and specify the level of protection being asserted.

5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to designate qualified information or items does not, standing alone, waive the Designating Party's right to secure protection under this Order for such material. Upon timely correction of a designation, the Receiving Party must make reasonable efforts to assure that the material is treated in accordance with the provisions of this Order.

6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed.

6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution process by providing written notice of each designation it is challenging and describing the basis for each challenge. To avoid ambiguity as to whether a challenge has been made, the written notice must recite that the challenge to confidentiality is being made in accordance with this specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in good faith and must begin the process by conferring directly (in voice to voice dialogue; other forms of communication are not sufficient) within 14 days of the date of service of notice. In conferring, the Challenging Party must explain the basis for its belief that the confidentiality designation was not proper and must give the Designating Party an opportunity to review the designated material, to reconsider the circumstances, and, if no change in designation is offered, to explain the basis for the chosen designation. A Challenging Party may proceed to the next stage of the challenge process only if it has engaged in this meet and confer process first or establishes that the Designating Party is unwilling to participate in the meet and confer process in a timely manner.



1           6.3     Judicial Intervention. If the Parties cannot resolve a challenge without court  
2 intervention, the Designating Party shall file and serve a motion to retain confidentiality under  
3 Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) within 21 days of  
4 the initial notice of challenge or within 14 days of the parties agreeing that the meet and confer  
5 process will not resolve their dispute, whichever is earlier. Each such motion must be  
6 accompanied by a competent declaration affirming that the movant has complied with the meet  
7 and confer requirements imposed in the preceding paragraph. Failure by the Designating Party to  
8 make such a motion including the required declaration within 21 days (or 14 days, if applicable)  
9 shall automatically waive the confidentiality designation for each challenged designation. In  
10 addition, the Challenging Party may file a motion challenging a confidentiality designation at any  
11 time if there is good cause for doing so, including a challenge to the designation of a deposition  
12 transcript or any portions thereof. Any motion brought pursuant to this provision must be  
13 accompanied by a competent declaration affirming that the movant has complied with the meet  
14 and confer requirements imposed by the preceding paragraph.

15           The burden of persuasion in any such challenge proceeding shall be on the Designating  
16 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose  
17 unnecessary expenses and burdens on other parties) may expose the Challenging Party to  
18 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to  
19 file a motion to retain confidentiality as described above, all parties shall continue to afford the  
20 material in question the level of protection to which it is entitled under the Producing Party's  
21 designation until the court rules on the challenge.

22     7.     ACCESS TO AND USE OF PROTECTED MATERIAL

23           7.1     Basic Principles. A Receiving Party may use Protected Material that is disclosed or  
24 produced by another Party or by a Non-Party in connection with this case only for prosecuting,  
25 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to  
26 the categories of persons and under the conditions described in this Order. When the litigation has  
27 been terminated, a Receiving Party must comply with the provisions of section 15 below (FINAL  
28 DISPOSITION).

Protected Material must be stored and maintained by a Receiving Party at a location and in a secure manner that ensures that access is limited to the persons authorized under this Order.

7.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any information or item designated “CONFIDENTIAL” only to:

(a) the Receiving Party’s Outside Counsel of Record in this action, as well as employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the information for this litigation;

(b) the officers, directors, and employees (including House Counsel) of the Receiving Party to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(c) Experts (as defined in this Order) of the Receiving Party (1) to whom disclosure is reasonably necessary for this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A) and (3) as to whom the procedures set forth in paragraph 7.6 have been followed;

(d) the court and its personnel;

(e) court reporters/videographers and their staff, professional jury or trial consultants, and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

(f) during their depositions, witnesses in the action to whom disclosure is reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be separately bound by the court reporter and may not be disclosed to anyone except as permitted under this Protective Order.

(g) the author or recipient of a document containing the information or a custodian or other person who otherwise possessed or knew the information.

1           7.3     Disclosure of “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”  
2 Information or Items. Unless otherwise ordered by the court or permitted in writing by the  
3 Designating Party, a Receiving Party may disclose any information or item designated “HIGHLY  
4 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” only to:

5           (a) the Receiving Party’s Outside Counsel of Record in this action, as well as  
6 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
7 information for this litigation;

8           (b) Designated House Counsel of the Receiving Party (1) to whom disclosure is  
9 reasonably necessary for this litigation, and (2) who has signed the “Acknowledgment and  
10 Agreement to Be Bound” (Exhibit A);<sup>1</sup>

11           (c) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for  
12 this litigation, (2) who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit  
13 A), and (3) as to whom the procedures set forth in paragraph 7.6, below, have been followed;

14           (d) the court and its personnel;

15           (e) court reporters/videographers and their staff, professional jury or trial consultants,  
16 and Professional Vendors to whom disclosure is reasonably necessary for this litigation and who  
17 have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A); and

18           (f) the author or recipient of a document containing the information or a custodian or  
19 other person who otherwise possessed or knew the information.

20           7.4 Disclosure of “HIGHLY CONFIDENTIAL – SOURCE CODE” Information or  
21 Items. Unless otherwise ordered by the court or permitted in writing by the Designating Party, a  
22 Receiving Party may disclose any information or item designated “HIGHLY CONFIDENTIAL –  
23 SOURCE CODE” only to:

24           (a) the Receiving Party’s Outside Counsel of Record in this action, as well as  
25 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
26 information for this litigation;

27 \_\_\_\_\_  
28 <sup>1</sup> This Order contemplates that Designated House Counsel shall not have access to any  
information or items designated “HIGHLY CONFIDENTIAL – SOURCE CODE.”

1 (b) no more than 3 Experts of the Receiving Party<sup>2</sup> (1) to whom disclosure is  
2 reasonably necessary for this litigation, (2) who have signed the “Acknowledgment and  
3 Agreement to Be Bound” (Exhibit A), and (3) as to whom the procedures set forth in paragraph  
4 7.6, below, have been followed;

5 (c) the court and its personnel;

6 (d) court reporters/videographers subject to the provisions in Section 9; and

7 (e) the author or recipient of a document containing the information or a custodian or  
8 other person who otherwise possessed or knew the information.

9 7.5 Mock Jurors. Mock jurors hired by trial consultants in connection with this  
10 litigation may only be told about or shown “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
11 ATTORNEYS’ EYES ONLY” materials provided: (1) they are not affiliated with any party to this  
12 case or their direct competitor; (2) they agree in writing to be bound by confidentiality; and (3)  
13 they are not themselves given custody of any Protected Material, nor permitted to remove any  
14 presentations, questionnaires or notes taken during the exercise from any room in which the  
15 research is conducted. For the sake of clarity, mock jurors should not be shown material  
16 designated “HIGHLY CONFIDENTIAL – SOURCE CODE.”

17 7.6 Procedures for Approving or Objecting to Disclosure of “CONFIDENTIAL,”  
18 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –  
19 SOURCE CODE” Information or Items to Experts.

20 (a) Unless otherwise ordered by the court or agreed to in writing by the Designating  
21 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item  
22 that has been designated “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’  
23 EYES ONLY” or “HIGHLY CONFIDENTIAL – SOURCE CODE” pursuant to this Order first  
24 must make a written request to the Designating Party that (1) sets forth the full name of the Expert  
25 and the city and state of his or her primary residence, (2) attaches a copy of the Expert’s current  
26 resume, (3) identifies the Expert’s current employer(s), (4) identifies each person or entity from  
27 \_\_\_\_\_

28 <sup>2</sup> To the extent additional experts need access, the parties agree to meet and confer in good faith,  
and the Receiving Party will not unreasonably withhold consent.

1 whom the Expert has received compensation or funding for work in his or her areas of expertise or  
2 to whom the expert has provided professional services, including in connection with a litigation, at  
3 any time during the preceding five years,<sup>3</sup> and (5) identifies (by name and number of the case,  
4 filing date, and location of court) any litigation in connection with which the Expert has offered  
5 expert testimony, including through a declaration, report, or testimony at a deposition or trial,  
6 during the preceding five years. The request shall also specify if the Expert may have access to  
7 “HIGHLY CONFIDENTIAL – SOURCE CODE.”

8 (b) A Party that makes a request and provides the information specified in the  
9 preceding respective paragraphs may disclose the subject Protected Material to the identified  
10 Expert unless, within 14 days of delivering the request, the Party receives a written objection from  
11 the Designating Party. Any such objection must set forth in detail the grounds on which it is based.

12 (c) A Party that receives a timely written objection must meet and confer with the  
13 Designating Party (through direct voice to voice dialogue) to try to resolve the matter by  
14 agreement within seven days of the written objection. If no agreement is reached, the Party  
15 seeking to make the disclosure to the Expert may file a motion as provided in Civil Local Rule 7  
16 (and in compliance with Civil Local Rule 79-5, if applicable) seeking permission from the court to  
17 do so. Any such motion must describe the circumstances with specificity, set forth in detail the  
18 reasons why disclosure to the Expert is reasonably necessary, assess the risk of harm that the  
19 disclosure would entail, and suggest any additional means that could be used to reduce that risk. In  
20 addition, any such motion must be accompanied by a competent declaration describing the parties’  
21 efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer  
22 discussions) and setting forth the reasons advanced by the Designating Party for its refusal to  
23 approve the disclosure.

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27 <sup>3</sup> If the Expert believes any of this information is subject to a confidentiality obligation to a third-  
28 party, then the Expert should provide whatever information the Expert believes can be  
disclosed without violating any confidentiality agreements, and the Party seeking to disclose to

1 In any such proceeding, the Party opposing disclosure to the Expert shall bear the  
2 burden of proving that the risk of harm that the disclosure would entail (under the safeguards  
3 proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

4 7.7 Territorial Restriction. No Protected Material may leave the territorial boundaries of  
5 the United States of America. Without limitation, this prohibition extends to Protected Material  
6 (including copies) in physical and electronic form. Without prior written authorization from the  
7 Producing Party, no Protected Material shall be electronically accessed from outside the territorial  
8 boundaries of the United States of America. The restrictions contained within this Section may be  
9 amended through the consent of the Producing Party to the extent that such agreed to procedures  
10 conform with applicable export control laws and regulations

11 8. PROSECUTION BAR

12 Absent written consent from the Producing Party, any individual who receives access to  
13 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL –  
14 SOURCE CODE" information shall not be involved in the prosecution of patents or patent  
15 applications relating to the subject matter of this action, including without limitation the patents  
16 asserted in this action and any patent or application claiming priority to or otherwise related to the  
17 patents asserted in this action, before any foreign or domestic agency, including the United States  
18 Patent and Trademark Office ("the Patent Office"). For purposes of this paragraph, "prosecution"  
19 means directly or indirectly drafting, amending, or advising on drafting or amending of patent  
20 claims on behalf of the patent holder.<sup>4</sup> To avoid any doubt, "prosecution" as used in this paragraph  
21 does not include representing a party challenging a patent before a domestic or foreign agency  
22 (including, but not limited to, a reissue protest, *ex parte* reexamination or *inter partes* review).  
23 This Prosecution Bar shall begin when "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES  
24 ONLY" or "HIGHLY CONFIDENTIAL – SOURCE CODE" information is first received and  
25 accessed by the affected individual and shall end two (2) years after final termination of this  
26 action.

27  
28 the Expert shall be available to meet and confer with the Designating Party regarding any such  
engagement.

1 9. SOURCE CODE

2 (a) To the extent production of source code becomes necessary in this case, a  
3 Producing Party may designate source code as “HIGHLY CONFIDENTIAL – SOURCE CODE”  
4 if it comprises or includes confidential, proprietary or trade secret source code.

5 (b) Any source code produced in discovery shall be made available for inspection, in a  
6 format allowing it to be reasonably reviewed and searched (but not necessarily compiled or  
7 “built”), during normal business hours or at other mutually agreeable times, at an office of the  
8 Producing Party’s counsel or another mutually agreed upon location. The source code shall be  
9 made available for inspection on a secured computer in a secured room without Internet access or  
10 network access to other computers, and with all input/output ports (such as USB, eSata, Firewire,  
11 etc.) disabled or blocked and account access restricted as appropriate to prevent and protect  
12 against unauthorized copying, transmission, removal or other transfer of any “HIGHLY  
13 CONFIDENTIAL – SOURCE CODE” Information outside or away from the secured computer,  
14 and the Receiving Party shall not copy, remove, or otherwise transfer any portion of the source  
15 code onto any recordable media or recordable device. The Producing Party may visually monitor  
16 the activities of the Receiving Party’s representatives during any source code review, but only to  
17 ensure that there is no unauthorized recording, copying, or transmission of the source code.

18 At the request of the Receiving Party, software applications reasonably necessary to  
19 perform analysis of the produced Source Code will be installed on the secured computer. The  
20 Receiving Party must provide the Producing Party with the CD,DVD, or electronic copy  
21 containing such licensed software tool(s) at least five (5) business days in advance of the date  
22 upon which the Receiving Party wishes to have the additional software tools available for use on  
23 the source code computer. The Producing Party may decline to install any requested inspection  
24 software if the software is not reasonably necessary to assist in reviewing and searching the  
25 electronic source code, if the software represents any unreasonable risk of compromising security  
26 of the source code or the source code computer, or if the software could be used for any other  
27 illegitimate purpose in contravention of the Protective Order. For emphasis, it should be noted

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<sup>4</sup> Prosecution includes, for example, original prosecution, reissue and reexamination proceedings.

1 that the tools for reviewing “HIGHLY CONFIDENTIAL – SOURCE CODE” Information may  
2 not be used to circumvent the protections of this Protective Order in any way or to compile the  
3 code.

4           Once “HIGHLY CONFIDENTIAL – SOURCE CODE” Information has been made  
5 available for inspection, the Receiving Party shall provide notice of its inspection five (5) business  
6 days prior to the inspection. The notice shall include the expected dates of the inspection as well  
7 as the name of each individual who will be conducting the inspection. Reasonable requests for  
8 inspection with fewer than five (5) business days’ notice will be considered at the discretion of the  
9 Producing Party. The Producing Party may maintain a daily log of the names of persons who  
10 enter the room to view the source code. The Producing Party may require that each individual for  
11 the Receiving Party, upon each entry or exit of the source code viewing room by that individual,  
12 sign a log, provided by the Producing Party, indicating the name of that individual, whether the  
13 individual entered or exited the source code viewing room, and the date and time of such entry or  
14 exit. Each such individual must also present a government issued picture identification before any  
15 access is granted.

16           The Receiving Party’s Experts shall be entitled to take handwritten notes relating to the  
17 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information, but may not copy any actual lines  
18 of the “HIGHLY CONFIDENTIAL – SOURCE CODE” Information into the notes. No copies of  
19 all or any portion of the “HIGHLY CONFIDENTIAL – SOURCE CODE” Information may leave  
20 the room in which the source code is inspected except as otherwise provided in this Protective  
21 Order. Further, no other written or electronic record of the “HIGHLY CONFIDENTIAL –  
22 SOURCE CODE” Information is permitted except as otherwise provided in this Protective Order.

23           (d) The Receiving Party may request paper copies of limited portions of source code  
24 that are reasonably necessary for the preparation of court filings, pleadings, expert reports, or other  
25 papers, or for deposition or trial, but shall not request paper copies for the purpose of reviewing  
26 the source code other than electronically as set forth in paragraph (c) in the first instance. The  
27 Producing Party shall provide all such source code in paper form, including bates numbers and the  
28 label “HIGHLY CONFIDENTIAL – SOURCE CODE.” The Producing Party may challenge the



1 amount of source code requested in hard copy form pursuant to the dispute resolution procedure  
2 and timeframes set forth in Paragraph 6 whereby the Producing Party is the “Challenging Party”  
3 and the Receiving Party is the “Designating Party” for purposes of dispute resolution. Absent  
4 good cause, the Receiving Party shall not request printing of any continuous block of “HIGHLY  
5 CONFIDENTIAL – SOURCE CODE” Information that results in more than fifty (50) printed  
6 pages per copy. Absent a showing of good cause, the Receiving Party may not request a total of  
7 more than five hundred (500) pages of printed “HIGHLY CONFIDENTIAL—SOURCE CODE”  
8 material.

9 (e) The Receiving Party shall maintain a record of any individual who has inspected  
10 any portion of the source code in electronic or paper form. The Receiving Party shall maintain all  
11 paper copies of any printed portions of the source code in a secured, locked area. The Receiving  
12 Party shall not create any electronic or other images of the paper copies and shall not convert any  
13 of the information contained in the paper copies into any electronic format. Any paper copies of  
14 “HIGHLY CONFIDENTIAL – SOURCE CODE” Information shall be stored or viewed only in  
15 the United States of America at the offices of Outside Counsel of Record for the Receiving Party  
16 or at the office of the approved Expert. All paper copies of Source Code Material shall be on  
17 orange, yellow or pink colored paper, stored in a secured locked area within the facilities of Fish  
18 & Richardson P.C. or Ni, Wang & Massand, PLLC or an approved Expert when not in use (e.g., a  
19 locked drawer or safe) and designated as “HIGHLY CONFIDENTIAL – SOURCE CODE.” For  
20 the sake of clarity, “HIGHLY CONFIDENTIAL – SOURCE CODE” Information may not be  
21 reviewed in public places such as airports, airplanes, and restaurants. The Receiving Party may  
22 also temporarily keep the printouts or photocopies in a secure container and location at: (i) the  
23 Court for any proceeding(s) relating to the Source Code for dates associated with the  
24 proceeding(s); (ii) the sites where any deposition(s) relating to the Source Code are taken for the  
25 dates associated with the deposition(s); and (iii) any intermediate and secure location reasonably  
26 necessary to transport the printouts or photocopies. The Receiving Party shall not create any  
27 electronic or other images of the paper copies and shall not convert any of the information  
28 contained in the paper copies into any electronic format. The Receiving Party shall only make

1 additional paper copies if such additional copies are (1) necessary to prepare court filings,  
2 pleadings, or other papers (including a testifying expert's expert report), (2) necessary for  
3 deposition, or (3) otherwise necessary for the preparation of its case. Any paper copies used during  
4 a deposition shall be retrieved by the Producing Party at the end of each day and must not be given  
5 to or left with a court reporter or any other unauthorized individual.

6 (f) The Receiving Party may include excerpts of Source Code that relate to the  
7 technical features that are at issue in the case in a pleading, exhibit, expert report, discovery  
8 document, deposition transcript, or other Court document, provided that such documents are  
9 appropriately designated under this order, restricted to those who are entitled to have access to  
10 them as specified in this order, and, if filed with the Court, filed under seal in accordance with the  
11 Court's rules, procedures, and orders. Such excerpts shall be limited to only the necessary  
12 portions of the source code.

13 (g) All Parties retain the right under the Federal Rules of Civil Procedure to object to  
14 the production of all or part of their source code, and to seek a protective order that such materials  
15 not be produced, or be produced under conditions that provide more stringent protection than  
16 those provided herein.

17 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER  
18 LITIGATION

19 If a Party is served with a subpoena or a court order issued in other litigation that compels  
20 disclosure of any information or items designated in this action as "CONFIDENTIAL," "HIGHLY  
21 CONFIDENTIAL – ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL – SOURCE  
22 CODE," that Party must:

23 (a) promptly notify in writing the Designating Party. Such notification shall include a  
24 copy of the subpoena or court order;

25 (b) promptly notify in writing the party who caused the subpoena or order to issue in  
26 the other litigation that some or all of the material covered by the subpoena or order is subject to  
27 this Protective Order. Such notification shall include a copy of this Protective Order; and  
28

(c) cooperate with respect to all reasonable procedures sought to be pursued by the Designating Party whose Protected Material may be affected.<sup>5</sup>

If the Designating Party timely seeks a protective order, the Party served with the subpoena or court order shall not produce any information designated in this action as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” or “HIGHLY CONFIDENTIAL – SOURCE CODE” before a determination by the court from which the subpoena or order issued, unless the Party has obtained the Designating Party’s permission. The Designating Party shall bear the burden and expense of seeking protection in that court of its confidential material – and nothing in these provisions should be construed as authorizing or encouraging a Receiving Party in this action to disobey a lawful directive from another court.

11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS LITIGATION

(a) The terms of this Order are applicable to information produced by a Non-Party in this action and designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – SOURCE CODE.” Such information produced by Non-Parties in connection with this litigation is protected by the remedies and relief provided by this Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking additional protections.

(b) In the event that a Party is required, by a valid discovery request, to produce a Non-Party’s confidential information in its possession, and the Party is subject to an agreement with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

1. promptly notify in writing the Requesting Party and the Non-Party that some or all of the information requested is subject to a confidentiality agreement with a Non-Party;
2. promptly provide the Non-Party with a copy of the Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific description of the information requested; and

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<sup>5</sup> The purpose of imposing these duties is to alert the interested parties to the existence of this Protective Order and to afford the Designating Party in this case an opportunity to try to

3. make the information requested available for inspection by the Non-Party.

(c) If the Non-Party fails to object or seek a protective order from this court within 14 days of receiving the notice and accompanying information, the Receiving Party may produce the Non-Party's confidential information responsive to the discovery request. If the Non-Party timely seeks a protective order, the Receiving Party shall not produce any information in its possession or control that is subject to the confidentiality agreement with the Non-Party before a determination by the court.<sup>6</sup> Absent a court order to the contrary, the Non-Party shall bear the burden and expense of seeking protection in this court of its Protected Material.

12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected Material to any person or in any circumstance not authorized under this Protective Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this Order, and (d) request such person or persons to execute the "Acknowledgment and Agreement to Be Bound" that is attached hereto as Exhibit A.

13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

Nothing in this Order shall require production of documents, information or other material that a Party contends is protected from disclosure by the attorney-client privilege, the work product doctrine, or other privilege, doctrine, or immunity. If documents, information or other material subject to a claim of attorney-client privilege, work product doctrine, or other privilege, doctrine, or immunity is inadvertently or unintentionally produced, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any such privilege, doctrine, or immunity in this or any other federal, state or other proceeding. Any Party that inadvertently or

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<sup>6</sup> The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

1 unintentionally produces documents, information or other material it reasonably believes are  
2 protected under the attorney-client privilege, work product doctrine, or other privilege, doctrine, or  
3 immunity may obtain the return of such documents, information or other material by notifying the  
4 recipient(s) and providing a privilege log for the inadvertently or unintentionally produced  
5 documents, information or other material. The recipient(s) shall gather and return all copies of  
6 such documents, information or other material to the producing Party, except for any pages  
7 containing privileged or otherwise protected markings by the recipient(s), which pages shall  
8 instead be destroyed and certified as such to the producing Party.

9 14. MISCELLANEOUS

10 14.1 Right to Further Relief. Nothing in this Order abridges the right of any person to  
11 seek its modification by the court in the future.

12 14.2 Right to Assert Other Objections. No Party waives any right it otherwise would  
13 have to object to disclosing or producing any information or item on any ground not addressed in  
14 this Protective Order. Similarly, no Party waives any right to object on any ground to use in  
15 evidence of any of the material covered by this Protective Order.

16 14.3 Export Control. Disclosure of Protected Material shall be subject to all applicable  
17 laws and regulations relating to the export of technical data contained in such Protected Material,  
18 including the release of such technical data to foreign persons or nationals in the United States or  
19 elsewhere. The Producing Party shall be responsible for identifying any such controlled technical  
20 data, and the Receiving Party shall take measures necessary to ensure compliance.

21 14.4 Filing Protected Material. Without written permission from the Designating Party  
22 or a court order secured after appropriate notice to all interested persons, a Party may not file in  
23 the public record in this action any Protected Material. A Party that seeks to file under seal any  
24 Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed  
25 under seal pursuant to a court order authorizing the sealing of the specific Protected Material at  
26 issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request  
27 establishing that the Protected Material at issue is privileged, protectable as a trade secret, or  
28 otherwise entitled to protection under the law. If a Receiving Party's request to file Protected

1 Material under seal pursuant to Civil Local Rule 79-5(e) is denied by the court, then the Receiving  
2 Party may file the Protected Material in the public record pursuant to Civil Local Rule 79-5(e)(2)  
3 unless otherwise instructed by the court.

4 14.5 Right to Seek Additional Protections. This Order is entered without prejudice to  
5 the right of any Party to seek additional protections from the Court as may be necessary under  
6 particular circumstances.

7 15. FINAL DISPOSITION

8 Within 60 days after the final disposition of this action, as defined in paragraph 4, each  
9 Receiving Party must return all Protected Material to the Producing Party or destroy such material.  
10 As used in this subdivision, “all Protected Material” includes all copies, abstracts, compilations,  
11 summaries, and any other format reproducing or capturing any of the Protected Material. Whether  
12 the Protected Material is returned or destroyed, the Receiving Party must submit a written  
13 certification to the Producing Party (and, if not the same person or entity, to the Designating Party)  
14 by the 60 day deadline that (1) identifies (by category, where appropriate) all the Protected  
15 Material that was returned or destroyed and (2) affirms that the Receiving Party has not retained  
16 any copies, abstracts, compilations, summaries or any other format reproducing or capturing any  
17 of the Protected Material unless otherwise allowed by this Order. Notwithstanding this provision,  
18 Counsel are entitled to retain an archival copy of all pleadings, motion papers, trial, deposition,  
19 and hearing transcripts, legal memoranda, correspondence, deposition and trial exhibits, expert  
20 reports, attorney work product, and consultant and expert work product, even if such materials  
21 contain Protected Material. Any such archival copies that contain or constitute Protected Material  
22 remain subject to this Protective Order as set forth in Section 4 (DURATION). Additionally, no  
23 person is required to return or destroy any information that they are required by law to retain.  
24 Further, no person is required to alter the operation of its backup/archive systems.

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26 ///

27 ///

1 Dated: June 19, 2018

NI, WANG & MASSAND, PLLC

2 By: /s/ Hao Ni

3 (with permission by Jonathan J. Lamberson)

4 Hao Ni

5 Attorneys for Plaintiff

6 HYPERMEDIA NAVIGATION, LLC

7 Dated: June 19, 2018

FISH & RICHARDSON P.C.

8 By: /s/ Jonathan J. Lamberson

9 Jonathan J. Lamberson

10 Attorneys for Defendant

11 MICROSOFT CORPORATION

12  
13 **ATTESTATION**

14 Pursuant to Civil L.R. 5-1(i)(3), I attest that concurrence in the filing of the document has  
15 been obtained from each of the other signatories above.

16 /s/ Jonathan J. Lamberson

17 Jonathan J. Lamberson

18 **IT IS SO ORDERED.**

19 DATED: 6/20/2018

20 

Hon. Haywood S. Gilliam, Jr.

United States District Court

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, \_\_\_\_\_ [print or type full name], of

4 \_\_\_\_\_  
5 [print or type full address], declare under penalty of perjury that I have read in its entirety and  
6 understand the Protective Order that was issued by the United States District Court for the  
7 Northern District of California on \_\_\_\_\_ [date] in the case of *Hypermedia*  
8 *Navigation LLC v. Microsoft Corp.*, Case No. 18-CV-00670-HSG. I agree to comply with and to  
9 be bound by all the terms of this Protective Order, and I understand and acknowledge that failure  
10 to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly  
11 promise that I will not disclose in any manner any information or item that is subject to this  
12 Protective Order to any person or entity except in strict compliance with the provisions of this  
13 Order.

14 I further agree to submit to the jurisdiction of the United States District Court for the  
15 Northern District of California for the purpose of enforcing the terms of this Protective Order,  
16 even if such enforcement proceedings occur after termination of this action.

17  
18 Date: \_\_\_\_\_

19  
20 City and State where sworn and signed: \_\_\_\_\_

21 Printed name: \_\_\_\_\_  
22 [printed name]

23  
24 Signature: \_\_\_\_\_  
25 [signature]